

D.P.U. 91-DS-5

Adjudicatory hearing in the matter of a possible violation of  
G.L. c. 82, § 40 by Heider Construction, Inc., Tewksbury,  
Massachusetts.

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APPEARANCES: Paul Heider, President  
Joseph Heider, Vice President  
Heider Construction, Inc.  
400 Woburn Street  
Tewksbury, Massachusetts 01876  
PRO SE  
Respondent

Daniel J. Wilkins, Esq.  
Colonial Gas Company  
40 Market Street  
P.O. Box 3064  
Lowell, Massachusetts 01853  
FOR: COLONIAL GAS COMPANY  
Intervenor

## I. INTRODUCTION

On April 23, 1991, the Pipeline Safety and Engineering Division ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to Heider Construction, Inc. ("Respondent" or "Heider Construction"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on March 28, 1991, at the Indian Ridge Condominium complex on Apache Way in Tewksbury, Massachusetts, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to give proper notification to underground utility operators and failed to exercise reasonable precautions during excavation, resulting in damage to an underground gas pipe operated by Colonial Gas Company ("Company" or "Colonial Gas").

On May 6, 1991, the Respondent replied by letter, denying the Division's allegations and offering its version of events. On July 9, 1991, the Division informed the Respondent by letter of its determination that the Respondent had violated the Dig-Safe Law and of the Respondent's right to appeal the decision in an adjudicatory hearing. On July 11, 1991, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). After notice duly issued, an adjudicatory hearing

was held on February 13, 1992, pursuant to the Department's procedures for enforcement under 220 C.M.R. § 99.00 et seq. At the hearing, the Hearing Officer granted the Company's motion for leave to intervene in the proceeding (Tr. at 40).

At the hearing, Mario Reed, compliance officer for the Division, and Carl Husted, a field supervisor for Colonial Gas, testified on behalf of the Division. Paul Heider and Joseph Heider, president and vice president respectively of Heider Construction, testified for the Respondent.

The Company submitted an initial brief on February 25, 1992 ("Company's Initial Brief"). The Respondent submitted a response on March 13, 1992 ("Heider Construction's Response"). The Company submitted a reply on June 11, 1992 ("Company's Reply"). The Respondent submitted a reply on September 24, 1992. <sup>1</sup>

## II. SUMMARY OF FACTS

At the hearing, Mario Reid testified that the Division sent an NOPV to the Respondent on April 23, 1991, in response to a damage report submitted to the Division by the Company (Exh. D-3; Tr. at 8). The damage report stated that the Respondent, during installation of a sewer line, had ruptured a two-inch gas line operated by Colonial Gas on Apache Way in front of apartment

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<sup>1</sup> On October 7, 1992, a site visit was held at the Indian Ridge Condominiums at the request of Colonial Gas. All parties attended the site visit.

units 175-186 ( i.e., Building 14) at the Indian Ridge Condominiums in Tewksbury, Massachusetts (Exh. D-1; Tr. at 15).

Mr. Reid stated that the Respondent called Dig-Safe System, Inc. ("Dig-Safe") on March 14, 1991 to report planned excavation work on Apache Way at the Indian Ridge Condominiums (Exh. D-2; Tr. at 16). According to Mr. Reid, the call indicated that the Respondent would be excavating in and around a number of buildings in the complex, including units 61-72 ( i.e., Building 6) (id.).<sup>2</sup> Mr. Reid claimed that the Respondent had failed to give adequate notification to underground utility operators, and failed to exercise reasonable precautions in tendering notification, resulting in damage to an underground utility (Exh. D-3; Tr. at 12-13). He contended that the notification did not give a reasonably accurate description of the location for excavation because it did not mention that the Respondent would be digging near Building 14 and would be crossing fields and roadways (Exh. D-5; Tr. at 14-15, 17, 78).

Carl Husted testified that in response to the Dig-Safe

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<sup>2</sup> The Dig-Safe notice No. 91112906, dated March 14, 1991, stated that the Respondent would be working at Apache Way, in Tewksbury, "at units 1 through 12, 25 through 36, 49 through 60, and 61 through 72 (Building 6) at the Indian Ridge Condo Complex." The nature of the work was "sewer main and service connection." The notice indicated that the Respondent planned to excavate in and around buildings, in the street, and from the street to the units (Exh. D-2; Tr. at 16).

request, the Company marked its gas main in front of Building 6 and the service lines that extend to the units (Exh. D-7; Tr. at 26).<sup>3</sup> Mr. Husted stated that the Respondent struck the gas main while excavating a trench from a manhole in front of Building 14, across Apache Way, to a second manhole located immediately behind Building 6 (Exh. D-7; Tr. at 28-29). The distance between the manholes was between 112 and 120 feet (Tr. at 72, 78). According to Mr. Husted, the damage site was approximately 119 feet from the corner of Building 6, and closer to Building 14 than Building 6 (Exh. D-7). He stated that the Respondent, in excavating the trench in the direction of Building 6, struck and ruptured the gas line at a point three feet from a sidewalk running along the side of Apache Way closest to Building 6 (Tr. at 28).

Mr. Reid testified that the Respondent had not indicated in the March 14, 1991 call to Dig-Safe that it would be working around Building 14 (Tr. at 30). Mr. Husted contended that a "reasonable contractor" would have included in its description of the proposed work area that part of the excavation would take

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<sup>3</sup> At the area of the complex where the excavation took place, Apache Way passes in front of Building 6, proceeds in the same direction while passing in front of other buildings, then curves around and proceeds in the opposite direction, eventually passing behind Building 6 and immediately in front of Building 14 (Exh. D-7; Tr. at 27). The Company's gas line follows Apache Way throughout the complex ( id. ). Heider Construction damaged the gas line at the point where it passes in front and close to Building 14, and to the rear of Building 6 ( id. ).

place "in front of Building 14 and to the rear of Building 6" (Tr. at 31). <sup>4</sup>

In disputing that Heider's notification was deficient, Joseph Heider testified that the site of the rupture was in a designated field of Building 6 (Exhs. Heider-1, 4; Tr. at 45). Paul Heider stated that a tape recording of the first Dig-Safe call indicated that the Respondent had requested that "all buildings and roadways" be marked and that the Respondent would be crossing over backyards, fields and roadways around the buildings (Exh. Heider-2; Tr. at 47, 49). In addition, Joseph Heider introduced a copy of a company log of the call, which indicated that he had told Dig-Safe that Heider Construction would be working on "private property, fields and all roadways around buildings" (Exh. Heider-2; Tr. at 50). Joseph Heider admitted that the Dig-Safe ticket did not contain a reference to "fields" but speculated that the word "fields" was left off the ticket because the Dig-Safe operator had run out of room (Tr. at

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<sup>4</sup> Mr. Reid testified that after rupturing the gas main, the Respondent contacted Dig Safe on March 29, 1991, to request a new Dig-Safe number, this one requesting that additional units be marked, including Building 14 (Exh. D-8; Tr. at 18, 32). According to Mr. Reid, this second "more reasonable, accurate description" included a notation that the Respondent would be "working in all roadways, in fields and units" (id.; Tr. at 33).

79).<sup>5</sup> He also stated that the Respondent had marked in green and orange paint the location and direction of the proposed excavation to show utility operators "where we were going to be crossing field areas, driveways, [and] lawns" (Exhs. Heider-3G-3L; Tr. at 56). He added that the gas and telephone utilities had properly marked their utilities in the area of the ruptured gas line (Tr. at 47). Moreover, he testified that Heider Construction had mentioned in its first call to Dig-Safe that if any utilities had questions about where to mark, they should call the Respondent before marking ( id. at 56).

Joseph Heider speculated that the Company only marked the immediate area behind Building 6 and not the grass field where the gas line break occurred because it misunderstood or neglected to follow the Respondent's instructions ( id. at 62, 64, 69). In support of its theory, he stated that when Colonial Gas remarked the areas in response to Heider's second call to Dig-Safe<sup>6</sup>, the markings were more than 12-feet from the area requested to be marked ( id. at 60; Exhs. Heider-3N, 30).

Joseph Heider presented a letter from Mr. James Toscano, manager of the Indian Ridge Condominium Association, which stated

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<sup>5</sup> We note that a tape recording of the first call revealed no mention of "fields" (DPU RR-1).

<sup>6</sup> The second call to Dig-Safe for additional markings, according to Joseph Heider, was made at the suggestion of Mr. Husted, not to cover up any information (Tr. at 80).

that the damage to the gas line was the result of the Company's failure to properly mark the area ( id. at 65; Exh. Heider-4).

### III. POSITIONS OF PARTIES

The Division claims that the Respondent violated the Dig-Safe Law by (1) failing to tender proper notification to the utilities in the area of excavation, resulting in damage to an underground gas pipe (Tr. at 12). Specifically, the Division argues that the Respondent's notification was defective because it did not indicate that the Respondent would be digging in front of Building 14, and across fields and roads (Tr. at 17, 78). The Division claims that the Respondent's failure to give a reasonably accurate description of the planned location for excavation also constitutes a failure to exercise reasonable precautions under the Dig-Safe Law (Tr. at 14-15). <sup>7</sup>

In its initial brief, the Company claims that the Respondent violated the Dig-Safe law by rupturing a gas line during excavation in an unmarked area that the Respondent failed to request through Dig-Safe to be marked (Company's Initial Brief at 1-2). The Company argues that although the Respondent informed Dig-Safe that it would be working at Building 6, it failed to

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<sup>7</sup> We do not address directly the Division's second claim of liability -- that the Respondent's inadequate notice constituted a failure to exercise reasonable precaution -- since the Dig-Safe Law only requires a finding that the Respondent failed to provide reasonably adequate notice.



indicate that it would be excavating "in all the roadways and fields" ( id. ). That information, the Company contends, was not provided until the Respondent's second call to Dig-Safe on March 29, 1992, the day after the damage to the gas line occurred ( id. ). The Company asserts that the damaged gas line was located in front of Building 14, and not, as the Respondent claims, adjacent to Building 6 ( id. at 2 ). As support for its contention, the Company states that the ruptured gas line was located 119 feet from the closest unit of Building 6 ( id. ). Moreover, the Company maintains that the tape recording of the Respondent's first Dig-Safe call proves that, contrary to the Respondent's contention, Heider Construction did not request for utility operators to contact the Respondent if there were questions about where to mark ( id. ).

In its response <sup>8</sup>, the Respondent claims that the written copy and tape recording of the first Dig-Safe call prove that Heider met its notice obligations under the Dig-Safe Law, in that

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<sup>8</sup> Appended to its response was a letter from H-Star Engineering, Inc., dated February 12, 1992, and a letter from James Toscano, dated February 10, 1992, which support the Respondent's position that it had not violated the Dig-Safe Law. The Toscano letter was introduced by the Respondent at the hearing and is an exhibit in this proceeding (Exh. Heider-4). However, the H-Star Engineering letter was not introduced at the hearing nor was it the subject of an information request. Therefore, we do not consider it part of the official evidentiary record in this proceeding.

it "'described the town where the excavation was to take place, named the street and way of the excavation site, named the street at the nearest intersection to the excavation, descri[bed]...the excavation site'" by noting "landmarks, such as the Indian Ridge Condo[mini]ums]," and noted that "the excavating limits would be 'in and around' units #61-72, building #6" (Heider Construction's Reply). In addition, the Respondent contends that the gas line which it ruptured was less than 110 feet from Building 6 and was located in an area designated for use by occupants of that building ( id. ). Thus, the Respondent speculates that the reason Colonial failed to mark the grass area where the rupture occurred was because the Company either misunderstood or neglected to follow its directions ( id. ). Finally, the Respondent contends that the Company, not Heider Construction, was negligent in marking its utilities and, therefore, violated the Dig-Safe Law ( id. ).

In its reply, the Company claims the gas line was damaged, not because the Company failed to properly mark the area, but because the Respondent excavated in an area that it had not requested be marked (Company's Reply at 1).

#### IV. STANDARD OF REVIEW

G.L. c. 82, § 40 states in pertinent part:

No person shall, except in an emergency, contract for, or make an excavation...in any public way... unless at least seventy-two hours...but not more than thirty

days, before the proposed excavation is to be made such person has given an initial notice in writing of the proposed excavation...to the city or town where such excavation is to be made. Such notice shall set forth the name of the street or the route number of said way and a reasonably accurate description of the location in said way or on private property where the excavation is to be made (emphasis added).

The statute requires that any person who contracts for or conducts an excavation must give advance notice and a reasonably accurate description of the excavation site to the operators of underground utilities. R.J. Cincotta Co., Inc., D.P.U. 89-DS-76 (1990); Todesca Equipment Co., Inc., D.P.U. 89-DS-14 (1990).

V. ANALYSIS AND FINDINGS

The only issue in this case is whether the Respondent failed to provide a reasonably accurate description of the intended excavation site, and that the inadequate notice resulted in damage to an underground utility. Guidelines for what constitutes "reasonably accurate" have been set forth in 220 C.M.R. 99.04. A reasonable description includes, inter alia, the city or town, name of the street, and number of the closest building to where the excavation will take place. 220 C.M.R. § 99.04(1)(a)-(f). <sup>9</sup>

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<sup>9</sup> The regulation states:

(1) To the extent reasonably practicable, notice of a non-emergency excavation shall include:

(a) the city or town where the excavation will take place;

(b) the name of the street, way, or route number  
(continued...)

A review of the record reveals several deficiencies with the Respondent's notification. Although the Respondent indicated that it would be working at a number of units in the condominium complex, including Building 6, Heider Construction gave no notice of its intent to excavate in front of Building 14. The Respondent stated in its Dig-Safe notice that it would be excavating on private property, in the street, and from the street to buildings (at Building 6). No mention was made of crossing fields or streets. The gas main damaged by Heider Construction ran in front of and serviced Building 14, and was located approximately 119 feet from the rear of Building 6. <sup>10</sup>

In accordance with the instructions given to Dig-Safe by the Respondent, the Company had marked all gas utilities in the immediate vicinity of Building 6, but had not marked the area that extends further from the rear of Building 6 and across Apache Way to the front of Building 14. The gas line damaged by Heider Construction was located in this unmarked area.

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<sup>9</sup>(...continued)

- of the excavation site;
- (c) the name of the streets at the nearest intersection to the excavation;
- (d) the number of the building closest to the excavation;
- (e) any/or other descriptions of the excavation site including landmarks and utility pole numbers; and
- (f) the date and location of any blasting.

<sup>10</sup> See, R.J. Cincotta Co., Inc., supra, in which we held that a damage site 120 feet away from the area designated to be marked was not a distance that the utility might reasonably mark. Id. at 4.

Based on these facts, we conclude that Colonial Gas marked the area it was asked to mark. It would be unreasonable to expect Colonial Gas to have marked an area beyond the immediate vicinity of the rear of Building 6, since the Respondent gave no indication that it would be excavating beyond that area and certainly did not alert the Company that it would be digging near Building 14, more than 100 feet from the rear of Building 6. We agree with the Company that a reasonable contractor, in providing reasonably adequate notice to Dig-Safe, would have indicated that "it was working in front of Building 14 and to the rear of Building 6." The fact that Heider Construction painted directional and location marks around the excavation site did not relieve it of its obligations under the Dig-Safe Law to provide a reasonably accurate description of the location to be excavated.

Accordingly, we find that the Respondent did not provide a reasonably accurate description of the location to be excavated, which resulted in damage to an underground utility operated by Colonial Gas. See R.J. Cincotta Co., Inc. and Todesca Equipment Co., Inc., supra. The failure to provide a reasonably accurate description rendered the Respondent's Dig-Safe number invalid for the site of the damaged gas pipe. See, Todesca Equipment, supra, at 4. Because the Respondent excavated at the Indian Ridge Condominiums on Apache Way in Tewksbury, Massachusetts on March 28, 1991 without a valid Dig-Safe number, we find that it violated the Dig-Safe Law. Id. at 4-5.

#### VI. ORDER

Accordingly, after due notice, hearing and consideration, the

Department

FINDS: That Heider Construction, Inc. violated the Dig-Safe Law when it excavated at the Indian Ridge Condominiums on Apache Way in Tewksbury, Massachusetts on March 28, 1991; and it is

ORDERED: That this being a second violation <sup>11</sup>, Heider Construction, Inc., shall pay a civil penalty of \$500 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within thirty days of the date of this Order.

By Order of the Department,

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<sup>11</sup> The Division submitted proof of the Department's finding of a previous violation of the Dig-Safe Law (DPU RR-2).